Tay Been Ong v Ong Kwi Hong & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO (MT-1)12–31 OF 2005
VERNON ONG JC
5 SEPTEMBER 2008

Damages (Personal Injury or Death) — Personal injuries — Arm — Fracture of radius — Grip power weaker by 10% than normal — Appellant a brick layer — Whether award by sessions court judge adequate

Damages (Personal Injury or Death) — Personal injuries — Medical expenses — Appellant sought treatment at private hospital — Whether sessions court judge correct in reducing claim for private hospital bill

Damages (Personal Injury or Death) — Personal injuries — Partial loss of future earnings — Injury to arm — From a brick layer to a supervisor with a reduced salary — Unchallenged medical evidence

This was the appellant/plaintiff's appeal against the decision of the learned sessions court judge ('SCJ') on the issue of quantum. The appellant's claim against the respondents was for damages arising from a motor-vehicle accident. At the trial of the action it was agreed that liability be apportioned at 90% on the part of the respondents and 10% on the part of the appellant. Special damages at RM1,535 was also agreed. The awards appealed against were on (i) Intra articular fracture distal right radius; (ii) medical bills; and (iii) partial loss of future earnings. The appellant submitted that for the award on intra articular fracture distal right radius the SCJ should have awarded RM25,000 instead of RM10,000 as the appellant's grip power was weaker by 10% than normal. The appellant contended that the full amount of the medical bills incurred by the appellant should be awarded instead of RM890. It was also contended that the SCJ ought to have allowed the appellant's claim for partial loss of future earnings of S$330,096 instead of S$7,280 awarded.

Held, dismissing the appeal with costs:

(1) Upon consideration of the facts and the authorities cited, the court was not convinced that in awarding RM10,000 the SCJ had

misapprehended the facts or had acted on any wrong principle of law. In the circumstances of the case it was the court's finding that the award of RM10,000 was fair and reasonable. It was not one that was so extremely small so as to make it an entirely erroneous estimate of the injury. Accordingly, the appellant's contention on this issue was without merit (see para 11).

(2) The appellant had clearly failed to prove that he was justified in seeking treatment at a private hospital. His reason was clearly specious and naive. If a person is spending his own money, he has every right to seek medical treatment wherever he wishes. But when he is claiming from somebody else in the form of damages, it is a different matter. The question of reasonableness cannot be separated from the issue of quantum of damages. It is a matter of principle that the quantum of damages awarded must be reasonable. Thus, the SCJ's award for the medical bills was consistent with the facts and circumstances of this case (see paras 14-16); *Chai Yee Chong v Lew Thai* [2004] 2 MLJ 465 followed.

(3) There was no evidence to show that if the appellant had returned to work as a brick layer he would be earning less income than before the accident. In the premises it was merely conjecture on the part of the appellant to argue that he would suffer partial loss of future earnings against the unchallenged medical evidence. Accordingly the court was not convinced that the SCJ had acted on a wrong principle of law or had misapprehended the facts (see para 26).

[Bahasa Malaysia summary

Ini adalah rayuan perayu/plaintif terhadap keputusan hakim mahkamah sesyen yang bijaksana ('HMS') berkenaan isu kuantum. Tuntutan perayu terhadap responden-responden adalah untuk ganti rugi dari kemalangan kenderaan. Semasa perbicaraan tersebut ia telah dipersetujui bahawa pembahagian liabiliti adalah pada 90% bagi responden-responden dan 10% bagi perayu. Ganti rugi khas berjumlah RM1,535 juga telah dipersetujui. Award yang dirayu menentang adalah terhadap (i) *Intra articular fracture distal right radius* (ii) bil-bil perubatan; dan (iii) kehilangan sebahagian pendapatan masa hadapan. Perayu mengemukakan bahawa bagi award untuk *intra articular fracture distal right radius* HMS sepatutnya mengaward RM25,000 dan bukannya RM10,000 kerana kekuatan genggaman perayu adalah lebih lemah sebanyak 10% dari biasa. Perayu menegaskan bahawa bayaran bagi keseluruhan bil-bil perubatan perayu sepatutnya diawardkan dan bukan RM890. Ia turut dihujahkan bahawa HMS sepatutnya membenarkan tuntuan perayu untuk kehilangan sebahagian pendapatan

masa hadapan sebanyak S$330,096 dan bukannya S$7,280 yang telah diaward. A

Diputuskan, menolak rayuan dengan kos: B

(1) Setelah mengambilkira fakta-fakta dan autoriti yang disebut, mahkamah tidak yakin bahawa dengan mengaward RM10,000 HMS telah salah faham fakta-fakta atau telah bertindak atas prinsip undang-undang yang salah. Dalam hal keadaan kes ini adalah keputusan mahkamah bahawa award RM10,000 tersebut adalah adil dan berpatutan. Ia bukan sesuatu yang terlalu sedikit sehingga menyebabkan ia suatu anggaran yang salah secara keseluruhannya terhadap kecederaan tersebut. Oleh itu, hujah perayu terhadap isu ini adalah tanpa merit (lihat perenggan 11). C D

(2) Perayu secara jelasnya telah gagal untuk membuktikan bahawa beliau berjustifikasi untuk mendapatkan rawatan di hospital swasta. Alasan perayu adalah jelas seolah-olah betul dan naif. Jika seseorang membelanjakan wangnya sendiri, beliau mempunyai semua hak untuk mendapatkan rawatan di mana sahaja beliau ingin. Tetapi jika beliau menuntut dari orang lain dalam bentuk ganti rugi, maka ini adalah hal yang berbeza. Persoalan tentang kemunasabahan tidak boleh diasingkan dengan isu kuantum ganti rugi. Ia adalah berkenaan prinsip bahawa kuantum ganti rugi yang diaward mesti munasabah. Maka, award HMS bagi bil-bil perubatan adalah konsisten dengan fakta-fakta dan hal keadaan kes ini (lihat perenggan 14–16); *Chai Yee Chong v Lew Thai* [2004] 2 MLJ 465 diikut. E F

(3) Tidak terdapat bukti yang menunjukkan jika perayu kembali bekerja sebagai pengatur bata beliau akan mendapat pendapatan yang kurang berbanding sebelum kemalangan. Dalam hal ini ia hanyalah tekaan bagi pihak perayu untuk mempertikaikan yang dia akan kehilangan sebahagian pendapatan masa hadapan terhadap bukti perubatan yang tidak disangkal. Oleh itu mahkamah tidak yakin bahawa HMS telah bertindak atas prinsip undang-undang yang salah atau telah tersalah faham terhadap fakta-fakta (lihat perenggan 26).] G H

Notes

For cases on arm, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 518–520. I

For cases on medical expenses, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 785–786.

For cases on personal injuries in general, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 514–879.

Cases referred to

Ai Onn a/l Ai Frun & Anor v Imran bin Abdullah [2003] Mallal's Digest para 1743 (folld)
Batumalee a/l Masilamani v Thong Chan Leng [2003] 4 MLJ 391 (refd)
Chai Yee Chong v Lew Thai [2004] 2 MLJ 465 (folld)
Khoo In Chu v Jeremy Chong Hoe Siong [1990] 1 MLJ 1 (distd)
Lee Chong Win & Ors v Poh Ching Guan [2001] Mallal's Digest 1147 (folld)
Mahmod bin Kailan v Goh Seng Choon & Anor [1976] 2 MLJ 239 (refd)
Moeliker v Reyrolle & Co Ltd [1977] 1 WLR 132 (distd)
Ngooi Ku Siong & Anor v Aidi bin Abdullah [1985] MLJ 30 (distd)
Romulo a/l Appalasamy & Anor v Tan Seng Kee & Anor [2000] 5 MLJ 665 (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (folld)
Smith v Manchester Corp [1974] 17 KIR 1 (refd)
Topaiwah v Salleh [1968] 1 MLJ 285 (refd)

Legislation referred to

Civil Law (Amendment) Act 1984 s 28A, 28A(2)(c)
Evidence Act 1950 s 33

K Zaman (Zaman & Associates) for the appellant.
Ong (Ong & Ong) for the respondent.

Vernon Ong JC:

[1] This is the appellant/plaintiff's appeal against the decision of the learned sessions court judge ('SCJ') given on 28 January 2005 on the issue of quantum.

BRIEF FACTS

[2] The appellant's claim against the respondents is for damages arising from a motor-vehicle accident. At the trial of the action it was agreed that liability be apportioned at 90% on the part of the respondents and 10% on the part of the appellant. Special damages at RM1,535 was also agreed. The following awards were made by the learned SCJ.

	Particulars	Award
(1)	Wasting of forearm	RM1,000
(2)	Haemotama of patella	RM2,000
(3)	Intra articular fracture right radius	RM10,000
(4)	Medical bills	RM890
(5)	Loss of earnings	S$4,680

(6)	Partial loss of future earnings	S$7,280

[3] At the hearing of the appeal the appellant abandoned their appeal on items No (1), (2) and (5). In relation to the awards appealed against [items no (3), (4) and (6) above], it is pertinent to note what the SCJ had to say in his grounds of judgment:

(3) *Intra articular fracture distal right radius*

Peguam plaintif berhujah RM25,000 dan merujuk kepada kes *Ai Onn a/l Ai Frun & Anor v Imran bin Abdullah & Anor* MCL August 2003 para 1083. Peguam defendan berhujah RM6,000 dan merujuk kes *Batumalee* [2003] 4 MLJ 391. Saya berpendapat ganti rugi sebanyak RM10,000 adalah munasabah untuk kecederaan ini.

(4) *Bil perubatan*

Selepas kemalangan plaintif terus pergi berjumpa dengan doktor pakar di Raj Orthopaedic Surgery. Plaintif membelanjakan sebanyak RM2,671 di Raj Orthopaedic Surgery. Alasan beliau mendapat rawatan di Raj Orthopaedic Surgery adalah kerana di hospital kerajaan ambil masa untuk dapat rawatan. Mengikut plaintif jika ambil masa yang lama, majikan beliau akan batalkan permit kerja. Beliau tidak boleh bekerja di Singapura jika permit kerja dibatalkan. Alasan yang diberikan oleh plaintif adalah tidak munasabah. Beliau tidak cuba dahulu untuk dapat rawatan di hospital kerajaan untuk mengetahui sama ada sesuatu rawatan itu mengambil masa yang lama atau tidak. Plaintif gagal membuktikan justifikasi mendapat rawatan di hospital swasta. Mahkamah membenarkan 1/3 daripada bil perubatan yang berjumlah RM2,671 iaitu RM890.

(6) *Kehilangan sebahagian pendapatan*

Plaintif menuntut kehilangan sebahagian pendapatan berjumlah S$143,520 (S$90 – S$50 x 26 hari x 12 bulan x 11½ tahun). Selepas kemalangan plaintif balik bekerja semula dengan SP1 bukan sebagai brick layer tetapi sebagai supervisor dengan gaji S$50 sehari kerana beliau tidak boleh angkat barang berat, tangan tidak kuat untuk buat kerja lama. Kelemahan tangan plaintif memang disokong oleh laporan pakar Dr JR Raj di mana dinyatakan 'Grip power is mildly weaker than left (10% weaker as measured in gripmeter)'. Laporan Dr JR Raj juga menyatakan 'He should do lighter work if the heavier work causes pain in the wrist'. Keterangan doktor pakar defendan (SD1) juga menyatakan kelemahan tangan plaintif sebanyak 10%. Isu yang perlu diputuskan oleh mahkamah ialah sama ada kelemahan ini menyebabkan plaintif tidak boleh bekerja lagi sebagai seorang 'brick layer' dan terpaksa mengambil tugas sebagai seorang supervisor dengan gaji yang lebih rendah. SD1 juga menyatakan kelemahan tangan plaintif sebanyak 10% tidak akan menghalang plaintif dari bekerja sebagai seorang 'brick layer' kecuali jumlah batu bata yang boleh dipasangkan akan berkurangan 10%. Keterangan SD1 menunjukkan yang plaintif masih boleh bekerja sebagai seorang 'brick layer'.

Mahkamah menerima keterangan SD1. Tuntutan plaintif untuk kehilangan sebahagian pendapatan bagi tempoh 11½ tahun adalah tidak dibenarkan. Keterangan SD1 kecederaan seperti ini biasanya 'period of disability' adalah sembilan bulan. Mahkamah telah benarkan tuntutan plaintif untuk kehilangan pendapatan selama dua bulan. Oleh itu tuntutan plaintif bagi kehilangan sebahagian pendapatan adalah dibenarkan untuk tempoh tujuh bulan sahaja yang berjumlah S$7,280 (S$90 – S$50 x 26 hari x 7 bulan).

APPEAL AGAINST QUANTUM — THE LAW

[4] It is settled law that in hearing an appeal against the quantum of damages, the award of damages by the trial judge may only be reversed in limited and exceptional circumstances. The guiding principle was enunciated by the Federal Court in *Topaiwah v Salleh* [1968] 1 MLJ 285 where Azmi CJ (Malaya) (as he then was) said at p 285:

> The difficulty of laying down the principles on which damages are awarded has frequently been recognised. However, as Lindley LJ in *Rodocanachi v Mibburn Brothers* stated:
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> > It must be remembered that the rules as to damages can, in the nature of things only be approximately just, and that they have to be worked out, not by mathematicians, but by juries.
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> Or another way of putting it — that it is a matter of assessment but not of calculation. So far as this court is concerned we should, paraphrase Greer LJ in *Flint v Levell* be disinclined to reverse the finding of a trial judge as to the amount of damages merely because we think that if we had tried the case in the first instance we would have given a lesser sum. *To justify reversing him, we should be convinced that he acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage.* The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the appellate court will follow in the special facts of each particular case.
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> (Emphasis added.)

[5] And later at p 286:

> If I had tried this case in the first instance, having regard to the previous awards in more or less similar cases probably I would not have awarded as much as $90,000 but I am not convinced that the trial judge acted upon some wrong principle of law, or that the amount awarded was so extremely high as to make it an entirely erroneous estimate of the damage to which the respondent is entitled.

[6] In 1976 this fundamental principle was reiterated by the Federal Court in *Mahmod bin Kailan v Goh Seng Choon & Anor* [1976] 2 MLJ 239 where Suffian LP said at p 240:

The principle upon which we can interfere with the award has been stated by Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd* as follows:

> *Where an award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages*. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer LJ in *Flint v Lovell. In effect the court before it interferes with an award of damages, should be satisfied that the judge had acted on a wrong principle of law, or has misapprehended the facts, or for these other reasons made a wholly erroneous estimate of the damages suffered*. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.
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> (Emphasis added.)

[7] It is therefore settled law that in an appeal against the quantum of damages the onus is on the appellant to establish that:

(i) the trial judge acted upon some wrong principle of law;

(ii) the trial judge had misapprehended the facts; or

(iii) that the amount awarded was so extremely high or so extremely small as to make it an entirely erroneous estimate of the damage.

[8] Turning now to the awards appealed against, it would be convenient to itemise and consider each of the three (3) awards individually.

1. *Intra articular fracture distal right radius*

[9] Learned counsel for the appellant submitted that RM25,000 should have been allowed as the appellant's grip power is weaker by 10% than normal. Further the appellant feels pain at extreme rotation. In support thereof learned counsel relied on *Ai Onn a/l Ai Frun & Anor v Imran bin Abdullah* [2003] Mallal's Digest para 1743 where an award of RM25,000 was made and in *Lee Chong Win & Ors v Poh Ching Guan* [2001] Mallal's Digest 1147 where S$25,000 was awarded.

[10] In reply learned counsel for the respondents submitted that the appellant's appeal ought to be rejected outright. There is nothing in the memorandum of appeal intimating that in making the award of RM10,000 the SCJ had acted on some wrong principle of law or that the amount awarded was so small as to make it an entirely erroneous estimate of the damage. In making the award the SCJ had also considered *Ai Onn a/l Frunn*.

(see SCJ's grounds of award at (3) above). In addition, the award of RM25,000 in *Ai Onn a/l Frunn*, took into account the following residual, namely that — 'The plaintiff experienced pain in his right wrist on exertion, limitation of movement of his right forearm and right wrist joint, weakness of his right hand grip and inability to lift heavy objects with his right hand'. The case of *Lee Chong Win*, was not cited by the appellant before the SCJ. The injuries in that case were also much more serious than that of the appellant. In that case the injury concerned another bone (the ulna) and there were attendant physical disabilities.

Finding of the court

[11] Upon a consideration of the facts and of the authorities cited this court is not convinced that in awarding RM10,000 the SCJ had misapprehended the facts or had acted on any wrong principle of law. The SCJ considered the two authorities cited before him. In the circumstances of the case it is the court's finding the award of RM10,000 is fair and reasonable. It is not one that is so extremely small so as to make it an entirely erroneous estimate of the injury. Accordingly, the appellant's contention on this issue is without merit.

2. *Medical bills*

[12] Learned counsel for the appellant submitted that it is the appellant's basic right to get the best medical treatment (*Romulo a/l Appalasamy & Anor v Tan Seng Kee & Anor* [2000] 5 MLJ 665; *Batumalee a/l Masilamani v Thong Chan Leng* [2003] 4 MLJ 391). The appellant contended that he wanted to be treated faster so that he could return to work. If he had to take long medical leave his work permit will be cancelled and would not be able to work in Singapore anymore. The appellant's reason is justifiable. Learned counsel submitted that the full amount of the medical expenses incurred by the appellant should be awarded.

[13] In reply learned counsel for the respondents submitted that the appellant did not even go to a government hospital to be treated. Under cross-examination the appellant said:

> Selepas kemalangan saya tidak cuba pergi ke hospital kerajaan dahulu. Saya tidak cuba ke hospital kerajaan dahulu kerana saya lihat kawan-kawan di hospital kerajaan ambil masa lama untuk dapat rawatan. Kawan-kawan saya juga mengalami kemalangan jalan raya. Saya tidak setuju di hospital kerajaan tidak ambil masa untuk dapat rawatan.

[14] Learned counsel submitted that the SCJ considered the appellant's reasons for seeking medical treatment at a private hospital and found that the reason was not reasonable. According to learned counsel the law applicable on the amount of medical expenses that can be awarded to a claimant has been laid down by the Court of Appeal in *Chai Yee Chong v Lew Thai* [2004] 2 MLJ 465 where at p 484 Abdul Hamid Mohamad FCJ (as he then was) said:

> To summarise my view on the issue, every person has a right to seek medical treatment at a hospital of his choice be it at a government hospital or at a private hospital. But, when it comes to awarding damages for such treatment, if the treatment sought is at a government hospital, the full amount expended and paid by the person should be awarded. But, if he seeks treatment at a private hospital, he has to prove, first that he is justified to seek treatment at a private hospital and, secondly, the amount incurred is reasonable. Regarding the first hurdle that he has to cross:
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> (a) He must prove that that particular treatment is not available at the government hospital either due to the unavailability of the necessary equipment or qualified doctors or other sufficient reasons; or
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> (b) He must prove that though the treatment is available at a general hospital, it is not available within a reasonable period considering the urgency of the treatment. This may be due to congestion at the government hospital or for other sufficient reasons; or
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> (c) He must prove that the treatment at the government hospital though available, is grossly inadequate. This may be due to lack of trained doctors in that particular field or for some other good reasons. As pointed out by Kamalanathan Ratnam JC in *Chong Chee Kong* with whom I agree, we are concerned with treatment, not accommodation.
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> If the court is not satisfied that the plaintiff is justified to seek treatment at a private hospital then, depending on the facts and the circumstances of each case, the court should either dismiss the claim altogether as was done by the Supreme Court in *Pengarah Institut Perubatan & Anor* and by this court in *Hj Ariffin Hj Ismail* or award an amount not exceeding one-third of the expenses as was done by the Supreme Court in *Tang Sia Bak*. It must be noted that the one-third is nowhere fixed by any written law. It is a matter of practice. If it is shown that in a particular case, even one-third is excessive, considering the expenses that otherwise would have been incurred in a government hospital, an amount less than one-third may be awarded.
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> Now, assuming that the plaintiff has crossed the first hurdle and the court is satisfied that the plaintiff is justified in seeking medical treatment at a private hospital, the plaintiff must prove that the expenses incurred and the amount claimed is reasonable taking into consideration normal charges at other local private hospitals. The court may award what it considers to be a reasonable amount which may even be the full amount claimed.

Finding of the court

[15] It is the court's finding that the appellant's contention on this issue is devoid of merit. The appellant has clearly failed to prove that he was justified in seeking treatment at a private hospital. His reason is clearly specious and naive. This contentious issue may be laid to rest upon a careful reading of what the Court of Appeal said in *Chai Yee Chong*, in relation to the appellant's contention that it is the basic right of the appellant to get the best medical treatment available. Abdul Hamid Mohamad FCJ (as he then was) also said at p 484:

> I have mentioned that there are two High Court decisions that say that a claimant is entitled to medical expenses expended by him in a private hospital of his choice as a matter of right. The cases are Chong Kam Seng and Chin Lin Soon. From the earlier discussion of the authorities, in particular, in view of the three decisions of the Supreme Court, ie Institut Penyelidikan Perubatan & Anor, Tang Sia Bak and even Tajuddin bin Shaik Daud and the judgment of this Court in Hj Ariffin Hj Ismail, not to mention the judgments of the High Court, that view clearly cannot stand.
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> In my view, if a person is spending his own money, he has every right to seek medical treatment wherever he wishes. But when he is claiming from somebody else in the form of damages, it is a different matter. The question of reasonableness cannot be separated from the issue of quantum of damages. It is a matter of principle that the quantum of damages awarded must be reasonable.

[16] Applying the principles enunciated it is the finding of this court that the SCJ's award for the medical bills is consistent with the facts and circumstances of this case. There is nothing to show that the SCJ had acted upon some wrong principle of law or had misapprehended the facts. The appellant's contention is devoid of merit.

3. *Partial loss of future earnings*

[17] It is the appellant's contention that the SCJ ought to have allowed the appellant's claim for partial loss of future earnings of S$330,096. Learned counsel for the appellant submitted that prior to the accident the appellant worked as a bricklayer earning S$90 per day. His employer (SP1) testified that prior to the accident the appellant could lay 1,000 bricks. But after the accident the appellant came back to work as a supervisor earning S$50 per day. He also said that the appellant could not perform his old job because he could not lift heavy loads. Cross-examination of the appellant's employer was reserved. As the respondent failed to call the said employer on two separate occasions, no cross-examination was carried out. Accordingly, learned counsel contended that the employer's evidence was not challenged and should be

accepted in toto. In support thereof learned counsel relied upon *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395. A

[18] Learned counsel also submitted that the SCJ relied on the evidence of Dr Aruljothey a/l Ratnasingam (SD1) that the appellant's period of disability is nine months. SD1 examined the appellant four years after the accident. SD1 confirmed that even after four years the strength of the wrist was still 10% weaker than normal. In cross-examination SD1 also said that the period of disability could be longer than nine months. SD1 also agreed that he does not know how much longer the weakness will remain (*Ngooi Ku Siong & Anor v Aidi bin Abdullah* [1985] MLJ 30; *Moeliker v Reyrolle & Co Ltd* [1977] 1 WLR 132; *Khoo In Chu v Jeremy Chong Hoe Siong* [1990] 1 MLJ 1). The appellant had mitigated his loss by returning to work with the same employer. Learned counsel, however, contended that it was unlikely that the employer would keep the job available for long period of time as it is more profitable for the employer to hire a new worker rather than hiring the appellant whose grip is only 90% of the normal range. B C D

[19] In reply learned counsel for the respondent referred to SD1's medical report (exh D5) which states that 'In my opinion he can do his old job as a mason. The weakness in grip function mentioned in Dr Raj's report can be overcome by intensive exercises'. Under cross-examination SD1 said that the appellant's grip will return to normal if he underwent intensive exercises through physiotherapy. SD1's opinion in this regard was not challenged by the appellant. The SCJ accepted the evidence of SD1 that the appellant could still work as a brick layer. E F

[20] Learned counsel for the respondent argued that the appellant failed to mitigate his loss when he did not undergo physiotherapy treatment which would have enabled his grip to return to normal. The appellant had the option of undergoing the said physiotherapy treatment but he neglected to do so. Instead, the appellant went back to work with the same employer as a supervisor at a lower wage. SD1's evidence that if the appellant had continued working as a brick layer the strength of the grip of his right hand would increase and that the more he worked the stronger the grip. This was not challenged or disputed by the appellant. G H

[21] Learned counsel for the respondent submitted that the appellant's contention that the respondent had failed to cross-examine the appellant's employer (SP1) is misconceived in law and in fact. Cross-examination of SP1 was reserved but at subsequent hearing dates SD1 did not turn up in court. The respondent was deprived of cross-examining SP1. SP1 had not been released as a witness and he had a continuing obligation to attend court. The respondent was under no obligation to ensure that SP1 attended court for the I

A cross-examination. The appellant is obliged to ensure that his witness SP1 was present in court. Due to the appellant's failure to procure the attendance of his witness in court for cross-examination, SP1's evidence would be of lower probative value than if cross-examination had taken place.

B Law on loss of earnings

[22] Loss of earnings has been conventionally divided into actual loss and future loss. Actual loss of earnings is calculated from the date of the accident up to the date of the trial. Loss of future earnings is calculated from the date C of trial. However, since the coming into force of s 28A of the Civil Law (Amendment) Act 1984 on 1 October 1984 the previous distinction between pre-trial and post-trial loss of earning is no longer applicable. Section 28A prescribes a fixed multiplier to be calculated according to the age of the plaintiff at the date of the accident. Paragraph (c) in sub-s(2) of s 28A also D prescribes certain conditions in assessing the loss of future earnings in personal injury claims. In order to claim for loss of future earnings it must firstly be established that the plaintiff must be below the age of 55 years at the time of the injury. Secondly, the plaintiff must have been in good health but for the injury. Thirdly, the plaintiff must have been receiving earnings by his E own labour or other gainful activity before he was injured.

[23] It is also necessary to note that there is a distinction between loss of future earnings and loss of earning capacity. In *Ngooi Ku Siong* the Federal F Court speaking through Syed Agil Barakbah FJ said at p 33:

> There is also a difference between loss of future earnings and loss of earning capacity although both items are under general damages. Future loss of earnings or loss of prospective earnings are awarded for real assessable loss ie loss that is capable of assessment at the date of the trial. It must be proved by evidence and not by G mere speculation. In the absence of such evidence if the court is satisfied that the plaintiff has suffered a loss of earning capacity, he will be awarded a sum as part of the general damages for his disability suffered as a result of the injuries sustained, instead of compensation for loss of future earnings. It arises where there is a residual risk that the plaintiff might be thrown out of work altogether at some H future date. The risk must be real and not speculative or fanciful. Any loss of money is relevant, whether the money is properly described as 'earnings' or not, provided that the money is more than a 'mere possible contingency'.

[24] This distinction was also explained by Scarman LJ in *Smith v* I *Manchester Corp* [1974] 17 KIR 1 in the following words:

> Loss of future earnings or future earning capacity is usually compounded of two elements. The first is when a victim of an accident finds that he or she can, as a result of the accident, no longer earn his or her pre-accident rate of earnings. In such a case there is an existing reduction in earning capacity which can be

calculated on as an annual sum. It is then perfectly possible to form a view as to the working life of the plaintiff and, taking the usual contingencies into account, to apply to that annual sum of loss of earnings, a figure which is considered to be the appropriate number of years' purchase in order to reach a capital figure.

The second element in this type of loss is the weakening of the plaintiff's competitive position in the open labour market: that is to say, should the plaintiff lose her current employment, what are her chances of obtaining comparable employment in the open labour market? The evidence here is plain — that, in the event (which one hopes will never materialise) of her losing her employment with Manchester Corporation she, with a stiff shoulder and a disabled right arm, is going to have to compete in the domestic labour market with women who are physically fully able. This represents a serious weakening of her competitive position in the one market into which she can go to obtain employment. It is for that reason that it is quite wrong to describe this weakness as a 'possible' loss of earning capacity: It is an existing loss: she is already weakened to that extent, though fortunately she is protected for the time being against suffering any financial damage because she does not, at present, have to go into the labour market.

It is clearly inappropriate, when assessing this element of loss, to attempt to calculate any annual sum or to apply to any sum so many years purchase. The court has to look at the weakness so to speak 'in the round', take a note of the various contingencies and do its best to reach an assessment which will do justice to the plaintiff...

Finding of the court

[25] When a witness dies or falls ill before cross-examination, his evidence in chief is admissible though its probative value may be very small and may even be disregarded. In this case, however, there was nothing to show that SP1 was prevented by death, sickness or other causes (mentioned in s 33 of the Evidence Act 1950) from finishing his testimony. The general rule is that when a witness has been intentionally called by either party and sworn the opposite party has a right to cross-examine the witness. The object of cross-examination is twofold — to weaken, qualify or destroy the case of the opponent; and to establish the party's own case by means of the opponent's witnesses. It is not confined to matters proved in chief for the slightest direct examination, even for formal proof, opens up the whole of the cross-examiner's case (see *Phipson on Evidence* (14th Ed). The respondent did not take any steps to compel SP1 to appear for cross-examination. In the particular circumstances of this case SP1's evidence cannot be objected on the ground that the evidence was not subjected to any cross-examination. SP1's evidence is admissible though its evidentiary value will depend upon the facts and circumstances of this case.

[26] In the present case there is evidence that the appellant had gone back to work with the same employer albeit as a supervisor and at a lower wage. SP1 said that the appellant 'tidak boleh buat kerja yang lama kerana tidak boleh angkat barang berat'. The appellant said that his employer 'beri kerja lain iaitu supervisor sebab tangan saya tidak kuat untuk buat kerja lama'. All this is premised on the appellant's complaint that the strength of the grip was 10% below normal. However, it is also pertinent to note that the injury (intra articular fracture of the right radius) sustained by the appellant has healed well. No surgery was performed on the appellant. According to the medical evidence the weakness in the grip was only temporary. It could be overcome by physiotherapy or intensive exercises. In fact the medical evidence states that the more the appellant worked the stronger his grip will become. The SCJ accepted the evidence of SD1 that the appellant could still work as a brick layer. This medical evidence was not challenged or disputed by the appellant. In addition the appellant did not undergo any physiotherapy treatment which would have restored his grip strength back to normal. No explanation was given by the appellant as to why he did not. The issue to be determined is whether due to the weakness of the grip the appellant is unable to work as a brick layer. In this regard the SCJ accepted the evidence of SD1 that the appellant was not prevented from working as a brick layer. There was no evidence to show that if the appellant had returned to work as a brick layer he would be earn less income than before the accident. In the premises it is merely conjecture on the part of the appellant to argue that he would suffer partial loss of future earnings against the unchallenged medical evidence. Accordingly the court is not convinced that the SCJ had acted on a wrong principle of law or had misapprehended the facts.

[27] In *Ngooi Ku Siong*, the claimant was not employed at the date of the trial having failed to return to his job as an administrative officer and complete the probationary period after hospitalisation. Instead he pursued a different course and succeeded in obtaining a private pilot licence. In fact he was better qualified that he was at the time of the accident. The court took the view that he was not entitled to loss of future earnings. His claim for loss of earning capacity was also disallowed because the court found that there is no substantial risk that he will not get employment again in the future like other able-bodied men.

[28] In *Moeliker*, the claimant was employed as a horizontal borer at the date of the trial. After the accident the claimant was hospitalised for five days and of work for about 15 weeks. He returned to work and sustained no loss of wages. The trial judge found that (i) it was very unlikely that the claimant would lose his job, but that it was a possibility; (ii) if the claimant did lose his job it was unlikely that, in spite of his physical disabilities, he would fail to get another job, because of his skill and experience, his ability to divert to

another trade and the comparative remoteness of the chance that he would be met by competitors of equal skill and experience. Accordingly, the claim for loss of earning capacity was not allowed. Upholding the trial judge's finding the Court of Appeal said that in awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life.

[29] In *Khoo In Chu*, the claimant was at the date of the trial practising as a dental surgeon in partnership. As a result of the accident his capacity to work was reduced. The claimant claimed for loss of earning capacity. He argued that on account of the disabilities his working capacity as a dental surgeon had been affected. He could not treat as many patients as before. He had become slower in his work. The court accepted that since the claimant's rate of work was slower he would earn less. The multiplier of nine years was fair and reasonable as the claimant was only 39 years old at the date of the assessment. The award of the assistant registrar for loss of future earnings was maintained.

[30] The above three cases cited by the appellant relate to claims for loss of earning capacity and not to loss of future earnings. In *Ngooi Ku Siong*, the claimant became better qualified after the date of the accident and his claim for loss of earning capacity was disallowed. In *Moeliker*, the claim for loss of earning capacity was also disallowed because it was very unlikely that the claimant would lose his job. Even if he did, it was unlikely that, in spite of his physical disabilities, he would fail to get another job because of his particular skill and experience. In *Khoo In Chu*, the claim for loss of earning capacity was allowed because the claimant's rate of work was slower resulting in not being able to treat as many patients as before. All these three cases are plainly distinguishable on the facts and are of no aid to the appellant's contention. For the reasons adumbrated the appeal is accordingly dismissed with costs.

Appeal dismissed with costs.

Reported by Sally Kee